No. 10-320

Supreme Court, U.S.
FILED
NOV 3 0 2010
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In The
Supreme Court of the United States

ANWAR HAQUE,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari To The New York State Supreme Court, Appellate Division, Second Department

REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JONATHAN I. EDELSTEIN
Counsel of Record
271 Madison Avenue, 20th Floor
New York, NY 10016
(212) 871-0571 x208
jonathan9@earthlink.net

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PRELIMINARY STATEMENT

Petitioner ANWAR HAQUE, by his counsel Jonathan I. Edelstein, respectfully submits this Reply Brief in response to the Brief in Opposition dated November 19, 2010 ("Opp. Brf.") and in further support of his petition for *certiorari* to the New York State Supreme Court, Appellate Division, Second Department.

ARGUMENT

POINT I

THIS COURT SHOULD GRANT CERTIORARI AND REMAND TO THE APPELLATE DIVISION FOR RECONSIDERATION IN LIGHT OF PADILLA

A. Vacatur and Remand is Appropriate, Regardless of the Development of the Factual Record, where it is Undisputed that the State Courts Ignored Padilla and Strickland.

Respondent's principal contention in its opposition brief is that the record is inadequate to decide petitioner's claim under Padilla v. Kentucky, 130 S. Ct. 1473 (2010). As will be discussed below,

that contention is incorrect. Even more to the point, however, respondent's arguments regarding the state of the record are a red herring, because the New York courts made an indisputable *legal* error. Specifically, even though both Padilla and Strickland v. Washington, 466 U.S. 668 (1984) were called to their attention, the state courts neither cited those cases nor applied the standard set forth therein. Instead, the Appellate Division rejected petitioner's claim on the basis that he received "meaningful representation," a standard that appears nowhere in Strickland and significantly does not incorporate the prejudice prong of the Strickland doctrine.

Respondent claims that the "meaningful representation" standard is sound because it is "more generous" than Strickland. See Opp. Brf. at 24-25. In some circumstances, this is no doubt the case, because New York courts may find ineffective assistance even without a showing of prejudice where an attorney's overall representation was poor. However, the New York standard also allows the opposite – i.e., that the state courts may *not* find ineffective assistance, even in the face of prejudicial error, where the attorney's overall representation was adequate.

In other words, "the New York test averages

out the lawyer's performance while Strickland focuses on any serious error and its consequences." Rosario v. Ercole, 617 F.3d 683, 686 (2d Cir. 2010) (Jacobs, C.J., dissenting from denial of rehearing *en banc*); see also id. at 684 (Wesley, J., concurring) ("the state standard could be misapplied to diminish the prejudicial effect of a single error"). The Second Circuit has recognized that, although more generous in many circumstances, the New York test may permit courts to "look past a prejudicial error as long as counsel conducted himself in a way that bespoke of general competency throughout the trial." Rosario v. Ercole, 601 F.3d 118, 126 (2d Cir. 2009).

This is, indeed, the way New York courts often do interpret the "meaningful representation" standard. See, e.g., People v. McClain, 250 A.D.2d 871, 873 (N.Y. App. Div. 1998) (finding that counsel committed errors, but not considering their prejudicial impact because "counsel propounded appropriate motions, presented an adequate opening statement, properly challenged testimony of witnesses and fully participated in the formulation of Supreme Court's charge to the jury"). And the New York Court of Appeals has opined that a single error by counsel may only amount to ineffective assistance if it is "clear-cut and completely dispositive," a far cry from the "reasonable probability" standard imposed

by Strickland. See People v. Borell, 12 N.Y.3d 365, 369 (N.Y. 2009); see also id. at 368 (stating with approval that New York courts "have often tolerated errors by counsel where the overall representation was nonetheless capable of characterization as 'meaningful').

It is thus clear that, rather than considering the substance of petitioner's Padilla claim and determining whether his attorney's inadequate immigration advice caused the prejudice contemplated by Strickland, the state courts "averaged out" his performance and considered only whether his overall representation was "meaningful." This clearly amounted, in practice, to a *less* generous standard than Strickland, even if the state standard might be more protective in other cases.

Consequently, this is an ideal case for "grant, vacate and remand" treatment. Because the state courts indisputably used the wrong legal standard, this Court should remand for reconsideration under the right one. At that point, the state courts will be able to determine for themselves whether the record is adequate or whether further factual development is necessary.

B. Petitioner's Padilla Claim Is Meritorious.

Respondents' brief argument as to the merits of petitioner's Padilla claim only highlights why *certiorari* should be granted in this case. The very issue to be determined (either by this Court or by the state courts on remand) is when, and under what conditions, a "reverse-Padilla" claim can succeed. The fact that there is a bona fide dispute as to whether the instant matter satisfies those conditions makes this an ideal test case.

Respondent's argument is also substantively flawed. In essence, respondent contends that, because petitioner would have been subject to *discretionary* deportation had he taken the plea, (a) his counsel did not act improperly in advising him that he would be deported, and (b) he would not have taken the plea even if fully and correctly advised. See Opp. Brf. at 19-20, 23. But there is a far cry between discretionary and mandatory deportation.

Respondents are correct that, if petitioner had taken the plea, he would have been "deportable" under 8 U.S.C. § 1227(a)(2)(A). However, nearly all resident aliens convicted of crimes would fall into that category. Those who are not aggravated felons – as petitioner would not have been had he taken the

plea – may seek discretionary relief, which is often granted to nonviolent offenders with American-citizen children. Indeed, as a practical matter, deportation proceedings are often *never commenced* against non-aggravated-felons who are sentenced to short county jail terms.

There is thus a qualitative difference between discretionary and mandatory deportation. Had petitioner taken the plea, removal proceedings would likely never have been commenced, and even if they had, he could have obtained counsel and petitioned for discretionary relief. The odds of him actually being deported would have been far less than the certainty he was *told* he would face, and would have figured heavily into any decision to plead or not plead.

Indeed, if respondent's argument is taken to its logical conclusion, there can *never* be a successful Padilla claim by a defendant who rejected a favorable plea. Respondent essentially claims that, because almost any alien convicted of a crime *may* someday be deported, it doesn't matter whether his counsel erroneously tells him that deportation is *certain*, and that the difference between a remote possibility and a virtual certainty is immaterial to a defendant's weighing of an offered plea. Given this

Court's explicit statement that intelligent plea bargaining is one of the purposes of accurate immigration advice, see Padilla, 130 S. Ct. at 1486-87, such an extreme position is untenable.

Moreover, there is yet another reason to believe that petitioner would have taken the plea if correctly advised. He said so at sentencing. And not only that, but the plea would have resulted in a sentence only five percent of the *minimum* he now faces. There is thus ample indication that petitioner suffered both the inadequate representation and prejudice prongs of Strickland as applied in Padilla.[1]

C. The Record Is More Than Sufficient to Review the Questions Presented.

In any event, respondent's contentions as to the inadequacy of the record are misplaced. To begin

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[1] Respondent also contends that petitioner cannot prove his eligibility for discretionary relief because the record does not show that he was a lawful permanent resident "for five years prior to his crimes." See Opp. Brf. at 22. In fact, both the prosecution and defense sentencing memoranda, which are part of the record, establish petitioner's residence (and ownership of a legitimate business) for the requisite period.

with, the Appellate Division obviously believed that the record was sufficient, as it decided petitioner's claim on the merits.

As respondent acknowledges, this Court may review a claim that was "expressly decided" by the state courts. See Adams v. Robertson, 520 U.S. 83, 86 (1997). In the instant case, the Appellate Division reviewed and rejected petitioner's ineffective assistance claims *in toto*, finding that he received "meaningful representation." See People v. Haque, 70 A.D.3d 967, 968 (N.Y. App. Div. 2009).

Respondent argues that, because petitioner's ineffective assistance claim had several branches and the Second Department did not reject each of them individually, it must not have "expressly decided" his Padilla claim. See Opp. Brf. at 17-18. However, there is no rule either in this Court or in the Appellate Division that requires the court to rule separately on each branch of a claim. It is common for intermediate appellate courts in New York to rule on multi-faceted ineffective assistance claims *in toto* without discussing each individual argument made by the appellant. Indeed, the state courts sometimes lump ineffective assistance claims together with other arguments and simply state that "the defendant's remaining contentions are without

merit." Such rulings are regarded by the courts as encompassing each facet of the claim.[2]

Accordingly, the claim herein was expressly decided by the Appellate Division and is properly before this Court.[3]

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[2] For instance, in People v. Shih-Wei Su, 213 A.D.2d 502, 503 (N.Y. App. Div. 1995), the Second Department, without specifically mentioning the defendant's ineffective assistance claims, found that his "remaining contentions are either unpreserved for appellate review or without merit." Upon a subsequent appeal from the denial of a post-conviction motion alleging ineffective assistance, the same court held that this claim was procedurally barred because it had been decided on the merits on direct appeal. See People v. Shih-Wei Su, 267 A.D.2d 260 (N.Y. App. Div. 1998).

[3] Respondent's contention that petitioner "still has" an opportunity to bring his Padilla claim before the courts via a motion under Section 440.10 of the New York Criminal Procedure Law, see Opp. Brf. at 14-15, 17, is disingenuous. Although respondent cites this Court's decision in Massaro v. United States, 538 U.S. 500 (2003), it neglects to inform this Court that the New York State judiciary has not adopted Massaro.

Respondent's contentions as to the adequacy of the record also depend upon taking various parts of it in isolation rather than considering it as a whole. For instance, respondent contends that, although petitioner's counsel expressed concern about "the fallout from immigration" in advising Mr. Haque about the potential plea, he did not state what advice he actually gave. This statement, however, must be

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Instead, New York requires "record-based" ineffective assistance claims to be raised on direct appeal. See, e.g., People v. Ozuna, 27 A.D.3d 339, 339-40 (N.Y. App. Div. 2007). In the instant case, because the grounds for petitioner's Padilla claim do appear in the record, he was required to raise it on direct appeal or else risk a procedural bar. Moreover, because the Appellate Division actually decided the claim, respondent will no doubt argue (although petitioner does not concede) that it is procedurally barred under N.Y. CPL § 440.10(2)(a) in the event that petitioner seeks to raise it in a future CPL § 440.10 motion. Petitioner, in other words, faces precisely the catch-22 that this Court decried in Massaro. Thus, at minimum, if this Court accepts the People's contention that the record is inadequate and that petitioner "still has" the chance to raise his Padilla claim via Section 440.10, it should require respondent to keep its word and waive any procedural bar should petitioner seek such relief.

taken *in combination* with petitioner's own statement at sentencing in which he made clear that he rejected the plea because he was given the impression that he would be subject to mandatory deportation.

Similarly, although respondent contends that the existence of a plea offer is supported only by petitioner's "self-serving statement" at sentencing, see Opp. Brf. at 13, the fact remains that the prosecuting attorney never contradicted this statement. Surely, had petitioner sought leniency based on a lie, the prosecutor would have set the record straight. The absence of any contrary indication on the record is sufficient for this Court to find that the plea offer was made.[4]

At any rate, this Court can sidestep any issues

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[4] Respondent's attempt to parse certain other statements on the record referring to the "possibility," "risk" or "likelihood" of deportation, see Opp. Brf. at 11-12, fares no better, because it ignores the fact that, at the time these statements were made, the plea offer had already been made and rejected. It is entirely natural for people to talk about a contingent event in terms of "possibility" even though, had the contingency occurred, the consequences would have been certain.

relating to the adequacy of the record by simply granting certiorari, vacating the Appellate Division's decision and remanding for reconsideration in light of Padilla. The state courts could then determine for themselves whether to decide the claim on the main record, remand for further fact-finding,[5] or relegate petitioner to a Section 440.10 post-conviction motion.

CONCLUSION

In light of the foregoing, this Court should grant *certiorari* on all issues raised in this Petition. Upon granting *certiorari*, this Court should review and vacate petitioner's conviction or, in the alternative, remand for reconsideration by the Appellate Division in light of Padilla.

Dated: New York, NY
November 29, 2010

JONATHAN I. EDELSTEIN

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[5] Contrary to respondents' contention, see Opp. Brf. at 26-27, petitioner does not claim that the Appellate Division was "constitutionally obligated" to conduct fact-finding with respect to his Padilla claim, only that it *has the power* to do so if it wishes.